BRUNEI REPORTS

CHONG KON FAH v. YONG SIAU

[C.A. (Briggs P., Huggins & Bewley JJ. sitting as Commissioners) May 27, 1982]

[Bandar Seri Begawan – Civil Appeal No. 8 of 1981]

Land Law – Contract – Agreement relating to transfer of "shophouse property" – Refusal on vendor's party to transfer interest in land – Whether agreement contravenes ss. 23 and 27 of Land Code and illegal.

Land Law – Contract – Contract not illegal – Specific performance against vendor – Land Code, ss. 23 & 27.

The plaintiff/appellant was the executor of the estate of Chong Vui Nee, deceased (the Purchaser). On June 26, 1957, Chong had entered into a contract in writing with the defendant respondent (the vendor). The contracting parties were entitled in equal undivided shares to a piece of land on which stood a shop. They were the only partners in a company called the Ghee Hoe Company, which operated a business in the shop. In or before 1957 the shop was occupied and continued to be occupied by the purchaser, by the plaintiff or by the plaintiff's relatives until it was burnt down on July 16, 1979.

The plaintiff alleged that the vendor was in breach of the agreement in that the vendor had sold his shares and interests including a "shophouse property" to the purchaser. The vendor claimed that the said agreement was not binding on him and that even if it did, it was void for illegality. The learned Chief Justice held in favour of the plaintiff on the first point but in favour of the vendor on the second, and he dismissed the action. The plaintiff appealed.

The subject matter of the suit was the land on which the shop stood. The plaintiff claimed that the "shophouse property" consisted of a building together with the land on which it had been erected.

The purchaser was not "a natural born subject of His Highness" and by virtue of the proviso to section 23 of the Land Code, a transfer to him could not be valid or be registered without the approval of the Sultan in Council.

Held. allowing the appeal: (1) in law, the building became part of the land and it would have needed very different language to show all that was being sold was a right to occupy a building;

(2) this was not a case where consent had been refused. There was no evidence that it was the intention of the parties to do something illegal; one should therefore assume that it was their intention to sell and purchase the land with the requisite approval;

(3) the court could not confirm the plaintiff's title, but it could order the vendor to do what he ought to have done long since. Confirmation of the title must rest upon the decision of the Sultan in Council. What might happen if approval were refused did not fall for consideration here;

(4) no injustice would result if an order of specific performance were made. The respondent was ordered to execute the appropriate form of transfer within one month, failing which the form should be executed by the Chief Registrar.

Cases referred to:

(1) *Levy* v. *Yates* (1838) 8 A & E 129; 112 E.R. 785.
(2) *Ewing* v. *Osbaldiston* (1836) 2 My. & Cr. 53; 40 E.R. 561.

COURT OF APPEAL.

David Teo for the appellant.

C.C. Yu for the respondent.

Cur. Adv. Vult.

Huggins J. (delivering Judgment of the Court): I am authorised by the President and Mr Justice Bewley to say that they agree with the judgment which I am about to read.

The plaintiff Appellant is the executor of the estate of Chong Vui Nee (deceased), "the Purchaser", who on June 26 1957 entered into a contract in writing with the defendant Respondent, "the Vendor". The contracting parties were entitled in equal undivided shares to a piece of land on which stood a shop. They were the only partners in a company called the Ghee Hoe Company, which operated a business in the shop, but it appears at some date in or before 1957 the shop was occupied and continued to be occupied by the Purchaser, by the Plaintiff or by the Plaintiff's relatives until it was burnt down on July 16 1979.

The material part of the written agreement was translated in these terms:

> "Yong Siau is desirous of doing other business and for this reason, is desirous of selling all his shares and interests in Ghee Hoe Company to Chong Vui Nee through the services of Kapitan China (headman of Chinese). The balance of the purchase price of Yong Siau's share, after deductions, is $7,000.00 and the remaining partner Chong Vui Nee hereby pays the said sum of $7,000.00 on this day to the outgoing partner Yong Siau who acknowledge receipt of the same. As from the date hereof, all property and assets belonging to Ghee Hoe Company, including a shophouse property, in which Yong Siau's name appears, book debts, anything and everything under the name of Ghee Hoe, shall be permanently under the charge (control) by succession".

The Plaintiff alleges that the Vendor is in breach of this agreement, whilst the vendor contends (1) that the Agreement did not bind him to do what the Plaintiff alleges and (2) that, even if it did, the Agreement was void for illegality. The learned Chief Justice held in favour of the

Plaintiff on the first point but in favour of the Vendor on the second, and he dismissed the action.

The subject matter of the suit is the land on which the shop stood. The Plaintiff claims that the "shophouse property" consisted of a building together with the land on which it had been erected. The Vendor contends that it consisted of the building only and that the parties never intended to deal with the land. The argument on behalf of the Vendor turned largely on parol evidence as to the intention of the parties. The Vendor himself said:

"I did not mean to transfer my interest in land."

The person who actually wrote down the agreement was allowed to testify that the word which (as I understand it) has been translated as "shophouse."

"to me means one building."

The Plaintiff, who was also the son of the Purchaser, was cross-examined about *his* understanding of the agreement and he said:

"My father did demand transfer when he bought shophouse as it belonged to him. I don't agree that 'the existing one unit shophouse' applies only to the building and not to the land."

It is submitted that the Chief Justice attached too much weight to the Plaintiff's evidence. The son's understanding was, of course, irrelevant – as was the Purchaser's demand, unless the agreement itself was ambiguous – but for my part I cannot see that the Chief Justice attached any, let alone too much, weight to this evidence. In law the building became part of the land and it would have needed very different language to show that all that was being sold was a right to occupy a building. I agree with the conclusion of the learned Chief Justice on this point.

The suggestion of the illegality of the agreement is based upon sections 23 and 27 of the Land Code, which are, so far as it is relevant, in these terms:

"23. Any person wishing to transfer, charge, lease, or sublease his land shall deliver to the Land Officer an instrument in one of the Forms D, E or F of the Schedule or such other forms as the Sultan in Council may from time to time by rule prescribe together with the extract under which he claims, and the Land Officer, if satisfied as to the transaction, shall register each transfer, charge, lease or sublease ... Provided that a transfer, charge, lease or sub-lease of land to a person who is not a natural born subject of His Highness shall be subject to, and shall not be valid or registered without, the approval of the Sultan in Council."

"27. No claim to or interest in any land shall be valid unless it has been registered in the Land Office."

It is common ground that the Purchaser is not "a natural born subject of His Highness" and that, by virtue of the proviso to section 23, a transfer to him cannot be valid or registered without the approval of the Sultan in Council. What has been contended on behalf of the Vendor – and, although he has not expressly so stated, I think the learned Chief Justice accepted the contention – is that, because any transfer executed by the Vendor would be invalid and could not be registered unless and until the Sultan in Council gave approval, the agreement to transfer was illegal. With respect I do not see the logic in that argument. That is not to say that I disagree with the Chief Justice when he says:

"But the proviso to section 23 seems to me to impose much more than a formality. It is intended to constitute a real substantive control on the holding of land by anyone who does not fall into the category of 'natural born subject'."

I think that is right, but he went on:

"Cons, J. had occasion to consider the section in *Tang Kee Hiong* v. *Cebu Far East Pte. Ltd. and another*, earlier this year. He reached the conclusion, with which I agree, that the section deals with substantive rights and makes *INVALID* any unapproved attempt to transfer land to a non-natural born subject."

Again I do not disagree with the first part of this conclusion, but the second part does not appear to me to be expressed in language consistent with the proviso: what is invalid is any unapproved transfer not "any unapproved attempt to transfer", whatever that phrase may mean.

I think it is helpful to consider what we were told is the usual conveyancing practice in cases where approval is required. Apparently applications for approval are submitted through the Land Officer, and they will normally be forwarded only when a duly executed transfer in the appropriate form prescribed in the schedule to the Land Code has been delivered to the Land Officer. Delivery of that transfer is all that is now required of this vendor: he can do no more, for we are told that the Plaintiff has now lodged with the Land Officer an application for the approval of the Sultan in Council. This appears to be a departure from the usual conveyancing practice but the Land Officer doubtless thought it proper in the special circumstances

of this case. In any event it is presumably for a purchaser to satisfy the Sultan in Council that he is a fit and proper person to own the land and that his proposed use of it is such the transfer ought to be approved. Accordingly performance of the contract by the Vendor consists in delivering a duly executed form of transfer to the Land Officer, and all that the order for specific performance would require would be delivery of a duly executed form of transfer. Such an order would not be an order "to effect an invalid transfer"; it would be an order to execute a transfer which would be entirely valid if approval were in due course given by the Sultan in Council. A court might well decline to order execution of a form of transfer where the approval of the Sultan in Council had already been applied for and refused, but under the usual conveyancing practice the application for approval would not have been forwarded until the form of transfer had been delivered. In any event this is not a case where consent has been refused. There is no evidence that it was the intention of the parties to do something illegal: One should therefore assume that it was their intention to sell and purchase the land with the requisite approval. Counsel for the Vendor relied upon *Levy* v *Yates*[1] but that was a case where it was impossible to obtain a licence for the particular theatrical production planned and the contract could not be performed lawfully. Similarly in *Ewing* v *Osbaldiston*[2] the theatre had not been, and could not be, licensed for the theatrical performances for which both the parties intended that it should be used.

If the argument on behalf of the Vendor were right, it would not be possible for a person who was not a natural born subject of His Highness to obtain a transfer of land. The usual conveyancing practice is readily understandable, because His Highness in Council would not want to be troubled with applications for approval of transfers for which there was no binding contract and which, when approved, might never take place. Yet, if the Vendor is right, there could not be a binding contract until approval had been sought and obtained. I would hold that he is not right.

The learned Chief Justice expressed sympathy for the Plaintiff and clearly regretted that it was not open to him to do what justice appeared to require. The Deceased had paid the purchase price and had occupied the shop for many years, obviously in the belief that everything necessary has been done. The Plaintiff now discovers that a necessary step in the transfer of title has been omitted and seeks to remedy the situation. The Vendor has had his money and his claim to the land discloses no merit whatsoever. I would like to think that the court will do all in its power to perfect the Plaintiff's title. It cannot confirm that title, but it can order the Vendor to do what he ought to have done long since. Confirmation of the title must rest upon the decision of the Sultan in Council. What may happen if approval is refused does not fall for consideration in this case. Counsel for the Vendor has emphasized that the contract did not provide that the transfer should be "subject to the approval of the Sultan in Council." Whether that would be material and whether there is an implied term that the contract should be subject to the giving of such approval may have to be decided hereafter.

One other matter must be mentioned. The Vendor pleaded section 3 of the Limitation Enactment 1962 and/or laches. The learned Chief Justice did not find it necessary to deal with the question whether or not the Plaintiff's claim was barred by the Limitation Enactment. He said, however:

> "Had I been obliged to do so, I might well have decided that it was not so barred, on the basis that the cause of action arose only when the Defendant refused in March 1980 to take any steps to secure the execution of the transfer."

This is a reference to a letter dated March 3, 1980, in which the Vendor declined to perform his side of the bargain for the reasons

> "1. That the sale merely referred to the business and the shophouse but did not include the land;
>
> 2. In any event the agreement (if any) alleged by your client was and is illegal."

As I have sought to show, in my judgment both reasons were bad; that letter constituted an anticipatory breach of contract if the contract was still in force and the limitation period would then not have expired by the date the writ was issued, i.e. April 29, 1981.

The Vendor contends that he had, on the evidence, broken the contract in 1957 and that time under the Enactment started to run then. Counsel founds the contention upon the Vendor's evidence that five or six months after the signing of the agreement the Purchaser "asked me to sell the land and I refused" and upon the Plaintiff's evidence, already cited, that his father "did demand transfer when he bought shophouse as it belonged to him." The short answer to this argument is that the Plaintiff did not rely upon any breach of contract

in 1957 but upon the letter of March 3, 1980. The contract was clearly still in existence at the date of that letter.

That the Purchaser and the Plaintiff have delayed long in bringing an action to obtain specific performance of the contract cannot be gainsaid, even though the learned Chief Justice did not refer to the defence of laches, which was pleaded. The topic was but briefly mentioned in argument in the court below and has not been mentioned at all before us. Specific performance is an equitable remedy and it will not be ordered where, by reason of undue delay, it is unjust to do so. In the present case I do not see that any injustice would result to the Vendor if an order were made.

I would allow the appeal and direct the Respondent to execute the appropriate form of transfer within one month. If he fails to do so, the form should be executed by the Chief Registrar. Costs here and below should follow the event.

Appeal allowed.

Solicitors: *Ibrahim & Chee, Yu & Co.*

KOH HOE PENG v. CENTRAL DEVELOPMENT LTD.

[C.A. (Briggs P., Yang J.A., Garcia J.) November 25, 1982]

[Bandar Seri Begawan – Civil Appeal No. 2 of 1982]

Land Law – Transfer of property to a non-natural born subject must be with approval of Sultan in Council – Land Code, s. 23.

On January 21, 1977, the Central Development Ltd. agreed to buy from one Koh three houses in Brunei. By the same agreement Koh also agreed to "transfer the said property to the Purchaser or its nominee". In November 1977, Central Development Ltd. having difficulty in selling the houses decided to transfer the three houses to a director of their company, one Lim. Lim was to hold the houses in trust for the company until purchasers could be found. Lim was a natural born subject of His Highness the Sultan of Brunei.

The issue before the court is whether, under the Torrens system of land registration as applicable in Brunei, it is lawful to transfer land to a natural born subject of His Highness when that subject is not intended to hold beneficially but is to be trustee for a person who is not a natural born subject of His Highness.

Held, dismissing the appeal and allowing the cross-appeal: since the discretion rests solely with the Sultan in Council, the agreement of January 21, 1977 and arrangements made by the parties in November 1977 could not be said to have the effect of defeating section 23 of the Land Code. The parties have no way of transfering any property without the aid of the Land Officer.

Cases referred to:

(1) *Chong Kon Fah* v. *Yong Siau* [1983] 1 M.L.J. 271.
(2) *Haji Abdul Rahman* v. *Mahomed Hassan* [1917] A.C. 209; 1 F.M.S.L.R. 290.
(3) *Hassan* v. *Ismail* [1970] 1 M.L.J. 210.
(4) *Abigail* v. *Lapin* [1934] A.C. 491, 500.
(5) *Wolfson* v. *Registrar General of New South Wales* (1934) 51 C.L.R. 300, 308.
(6) *Durani bin Haji Tahu* v. *Dato Kerna Hj. Jaya & Ors.* Civil Suit No. 25 of 1970 (unreported).
(7) *The Guardians of the Poor of the West Derby Union* v. *Metropolitan Life Assurance Society* [1897] A.C. 647.
(8) *Salomon* v. *A. Salomon & Co. Ltd.* [1897] A.C. 22.
(9) *R.* v. *Bhagwan* [1972] A.C. 60.
(10) *R.* v. *Newland* [1954] 1 Q.B. 158.

HIGH COURT.

Allen Yau (*Miss D.F. Abang Zen* with him) for the plaintiffs.

L.A.J. Smith (*Kugarajah* with him) for the defendant.

Cur. Adv. Vult.

Huggins J.: By an agreement in writing dated January 21, 1977 the defendant agreed to sell to the plaintiff three houses at a price of $85,000.00 each. The defendant now refuses to take the necessary steps to convey the land and the plaintiff sues for an order for specific performance.

The contention of the defendant is that the agreement was illegal and void and he relies on section 23 of the Land Code, the material parts of which are:

"Any person wishing to transfer, charge, lease or sub-lease his land shall deliver to the Land Officer an instrument in one of the Forms D, E or F of the Schedule or such other forms as the Sultan in Council may from time to time by rule prescribe together with the extract under which he claims, and the Land Officer, if satisfied as to the transaction, shall register such transfer, charge, lease or sub-lease.

. . . . .

Provided that a transfer, charge, lease or sub-lease of land to a person who is not a natural born subject of His Highness shall be subject to, and shall not be valid or registered without, the approval of the Sultan in Council."

Reference was also made to an amendment